DUTA WAJAR SDN BHD

v.

PASUKHAS CONSTRUCTION SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
JEFFREY TAN JCA
LINTON ALBERT JCA
[CIVIL APPEAL NO: W-02(IM)-1100-2010]
6 JULY 2012

ARBITRATION: *Arbitration clause - Existence of - Whether there was agreement in writing - Whether parties agreed to refer dispute to arbitration - Arbitration Act 2005, ss. 9(3) & 10*

The defendants/respondents, upon being awarded a construction project, entered into a sub-contract agreement with the plaintiff/appellant for the piling works at the construction site. Pursuant to the sub-contract, the plaintiff commenced and completed the work and submitted progress claims to the defendants. However, the defendants failed to make any payment and the plaintiff therefore filed a suit against the defendants. The defendants, disputing the plaintiff's claim, applied to stay the proceedings pursuant to s. 10 of the Arbitration Act 2005 ('the Act') and sought to refer the dispute to arbitration pursuant to cl. 10.1 of the alleged sub-contract agreement. The learned Senior Assistant Registrar dismissed the defendants' application for stay on the grounds that the plaintiff had never agreed to submit the dispute in question to arbitration in that the plaintiff had not signed the document containing the alleged agreement relied upon by the defendants. The defendants' appeal was allowed wherein the High Court judge found that there was acceptance of the provision to refer the dispute to arbitration by the "conduct of the plaintiff in bidding for and proceeding with the works". Hence this appeal by the plaintiff.

Held (allowing appeal with costs)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) There was no arbitration agreement in writing which existed between the parties as required by s. 9(3) of the Act. Therefore, the question of stay of proceedings pending arbitration under s. 10 of the Act did not arise. (paras 9 & 21)

A **(2)** The existence of an arbitration agreement in writing must be clearly established, particularly, where the party intending to establish the fact was relying on circumstantial evidence as in the instant case. However, the standard of proof had not been met in the case. (para 26)

B **(3)** As the plaintiff had neither signed nor responded to the draft sub-contract agreement sent to it by the defendants, there was, therefore, no exchange of letters or faxes or other means of communication between the parties that provides a record
C of a written arbitration agreement. (para 31)

Bahasa Malaysia *Translation Of Headnotes*

Defendan-defendan/responden-responden, selepas diawardkan dengan projek pembinaan, memasuki perjanjian sub-kontrak dengan
D plaintif/perayu untuk kerja-kerja pemantakan di kawasan pembinaan tersebut. Berikutan sub-kontrak, plaintif memulakan dan menyelesaikan kerja dan menyerahkan tuntutan kemajuan kepada defendan-defendan. Walaubagaimanapun, defendan-defendan gagal membuat apa-apa bayaran dan plaintif dengan itu memfailkan
E tuntutan terhadap defendan-defendan. Defendan-defendan mempertikaikan tuntutan plaintif, memohon penangguhan prosiding berikutan s. 10 Akta Timbang Tara 2005 ('Akta') dan memohon untuk merujuk pertikaian tersebut kepada timbang tara menurut kl. 10.1 perjanjian sub-kontrak yang didakwa. Penolong Kanan
F Pendaftar yang bijaksana menolak permohonan defendan-defendan untuk penangguhan atas alasan bahawa plaintif tidak pernah menyetujui untuk mengemukakan pertikaian yang dipersoalkan kepada timbang tara di mana plaintif tidak menandatangani dokumen yang mengandungi perjanjian seperti didakwa yang
G disandarkan oleh defendan-defendan. Rayuan defendan-defendan dibenarkan di mana hakim Mahkamah Tinggi mendapati bahawa terdapat penerimaan peruntukan untuk merujuk pertikaian kepada timbang tara oleh "tindakan plaintif dalam membida dan meneruskan dengan kerja-kerja tersebut". Maka rayuan ini oleh
H plaintif.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

I **(1)** Tidak wujud perjanjian timbang tara bertulis di antara pihak-pihak seperti yang diperlukan oleh s. 9(3) Akta. Dengan itu, persoalan penangguhan prosiding sementara menunggu timbang tara di bawah s. 10 Akta tidak terbangkit.

(2) Kewujudan perjanjian timbang tara bertulis mesti dibuktikan secara jelas, khususnya, di mana pihak yang berniat untuk membuktikan fakta bersandar atas keterangan ikut keadaan seperti di dalam kes ini. Walaubagaimanapun, standard pembuktian tidak dicapai dalam kes ini.

(3) Oleh sebab plaintif tidak menandatangani atau menjawab kepada draf perjanjian sub-kontrak yang dihantar kepadanya oleh defendan-defendan, maka tidak terdapat surat menyurat atau pertukaran faks atau cara komunikasi lain di antara pihak-pihak yang mewujudkan rekod perjanjian timbang tara bertulis.

Case(s) referred to:
Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor [2008] 3 CLJ 741 CA ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 9(3), (4)(b), 10

For the appellant - S Ashok (Vijaylatha Vellupillai with him); M/s YH Teh & Vellupillai & Assocs
For the respondents - Gideon Tan (Brian Cummings with him); M/s Gideon Tan Razali Zaini

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6-22-1126-2008]

Reported by S Barathi

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal against the decision of the High Court of Kuala Lumpur of 24 March 2010. The appellant, Duta Wajar Sdn Bhd was the plaintiff at the High Court. The respondents, namely:

(a) Pasukhas Construction Sdn Bhd

(b) I-Innovations Construction Sdn Bhd were the defendants.

[2] On 24 March 2010 the learned judge of the High Court of Kuala Lumpur, on appeal to the judge in chambers, had allowed the respondents'/defendants' appeal against the decision of the learned Senior Assistant Registrar.

[3] The learned Senior Assistant Registrar, earlier, on 4 June 2009, had dismissed the respondents' (the defendants) application to stay all proceedings in the action pursuant to s. 10 of the Arbitration Act 2005 ('the Act'). The learned Senior Assistant Registrar made a finding that the plaintiff had never agreed to submit the dispute in question to arbitration. She based her finding on the fact that the plaintiff had not signed the document containing the alleged agreement relied upon by the defendants.

[4] Section 10 of the Act provides:

> 10. Arbitration agreement and substantive claim before court.
>
> (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds:
>
> (a) that the agreement is null and void, inoperative or incapable of being performed; or
>
> (b) that there is in fact no dispute between the parties with regard to the matters to be referred.
>
> (2) The court, in granting a stay of proceedings pursuant to subsection (1), may impose any conditions as it deems fit.
>
> (3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[5] In allowing the appeal, the learned High Court judge was of the view that there was a sub-contract agreement subsisting between the parties. The learned High Court judge made a finding that there was acceptance of the provision, ie, cl. 10 of the sub-contract agreement, to refer the dispute to arbitration, although the plaintiff did not sign the sub-contract agreement. The learned High Court judge based his finding of acceptance on the 'conduct of the plaintiff in bidding for and proceeding with the works'. To the learned judge, signing the sub-contract agreement was a mere formality, citing *Bina Puri Sdn Bhd v. EP Engineering Sdn Bhd & Anor* [2008] 3 CLJ 741.

[6] The plaintiff is aggrieved by the decision of the learned High Court judge in allowing the defendants' appeal to the judge in chambers; and hence the plaintiff's appeal to this court. A

[7] On 6 July 2011 we unanimously allowed the plaintiff's appeal with costs. B

[8] We now give our grounds.

[9] We are of the view that there is no arbitration agreement in writing existing between the parties as required by s. 9(3) of the Act. Subsection (3) of s. 9 of the Act stipulates: C

> 9. Definition and form of arbitration agreement.
>
> ...
>
> (3) An arbitration agreement shall be in writing. D

[10] By reason of the above provision, it is imperative that an arbitration agreement, if at all there is any, be in writing.

[11] In the present case, is there evidence that the arbitration agreement (if at all there is any) is in writing? In our judgment, we do not think so. E

[12] The defendants were awarded a construction project in Cherating, Pahang, by a company known as MTM Millennium Holdings Sdn Bhd ('the employer'). F

[13] The defendants invited the plaintiff to tender their quotation for piling works at the project site. The plaintiff accepted the invitation. Subsequently, the plaintiff and the defendants entered into a sub-contract agreement for the supply and installation of piles at the construction site. G

[14] The defendants allege that this sub-contract is in writing and this agreement (ie, the sub-contract) is entered into by the parties on or around 16 October 2007 (see para. 5 of the defendants' affidavit in support of their application for stay). The plaintiff, however, takes the position that this sub-contract is not in writing and was not made on or around 16 October 2007. It was made in August 2007, but prior to 27 August 2007. H

[15] Be that as it may, it is contended by the defendants that cl. 10.1 of the alleged (sub-contract) agreement provides that any dispute, controversy or claim arising out of or relating to the alleged (sub-contract) agreement shall be settled by arbitration. I

[16] The plaintiff commenced work under the sub-contract on 27 August 2007 on the instructions of the defendants, and completed the work on 15 November 2007. The plaintiff had made three progress claims, and they are on 26 September 2007, on 26 October 2007 and on 19 November 2007, all in all amounting to RM1,433,500.10; but the defendants failed to make any payment. Therefore the plaintiff filed a suit against the defendants on 15 December 2008 to claim the sum.

[17] However, on 12 February 2009, by way of summons in chambers, the defendants made an application to stay proceedings pursuant to s. 10 of the Act.

[18] The draft (sub-contract) agreement (containing the arbitration clause-clause 10) was sent to the plaintiff by the defendants on 16 October 2007 and received by the plaintiff on 17 October 2007; but the plaintiff refused to sign the agreement as it disagreed with the terms of the proposed sub-contract.

[19] The defendants dispute the plaintiff's claim (made *via* the three progress claims) and seek to refer the dispute to arbitration pursuant to the said cl. 10.1 of the alleged sub-contract agreement. The said clause provides:

> 10. APPLICABLE LAW AND ARBITRATION
>
> 10.1 Any dispute, controversy or claim arising out of or relating to this sub-contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the provisions of the Arbitration Act 1952 [revised 1972] or any statutory modification or re-enactment
>
> 10.2 Governing law to be Malaysian laws.

[20] It is not disputed that the alleged sub-contract document relied upon by the defendants remains unsigned throughout, and that the plaintiff had never informed the defendants whether it was agreeable or otherwise to the terms of the proposed sub-contract agreement.

[21] On the facts, we are of the view that there is no arbitration agreement in writing existing between the parties. If there is no arbitration agreement in writing in existence between the parties, then the question of a stay of proceedings pending arbitration under s. 10 of the Act does not arise.

[22] However, this does not mean that there is no contractual relationship between the parties. On the evidence, there is. Significantly, this contractual relationship existed even before 27 August 2007. But there is no evidence that this sub-contract is in writing. It is pursuant to this sub-contract that the plaintiff commenced work on 27 August 2007; and thereafter submitted its progressive claims to the defendants.

[23] Since there is already in existence a contract (ie, a sub-contract) between the parties, the defendants cannot later impose another agreement on the plaintiff said to be a formal written sub-contract and to have been entered into (or deemed to have been entered into) on 16 October 2007 by the parties - unless, of course, the plaintiff agrees to be bound by this latter written agreement. But the plaintiff had declined to be a party to this second contract because it disagreed with the terms. It had refused to sign it.

[24] Mr Gideon Tan, learned counsel for the defendants, although conceding that the alleged sub-contract agreement has remained unsigned, nevertheless, contends that there is an arbitration agreement in writing between the parties. In support of his contention, the learned counsel for the defendants refers to s. 9(4)(b) of the Act that states:

> (4) An arbitration agreement is in writing where it is contained in -
>
> (a) ...
>
> (a) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement.

[25] The legal burden is on the defendants to satisfy the court on a balance of probabilities that there were exchanges of letters or faxes or other means of communication that provide a record of an arbitration agreement between the plaintiff and the defendants on or around 16 October 2007. In the present case, has this legal burden been discharged by the defendants when they made their application?

[26] On the evidence adduced, we do not think so. The existence of an arbitration agreement in writing must be clearly established, particularly, where the party intending to establish that

fact is relying on circumstantial evidence, as in the case here. The evidence must be clear. We do not think that the standard of proof has been met in the present case.

[27] Mr Gideon Tan submits that the requirement of s. 9(4)(b) has been satisfied as there are 'written communications exchanged between the parties'. Mr. Gideon Tan refers to the 'Invitation To Quote' letter received by the plaintiff from the defendants on 1 August 2007 containing a paragraph stating:

> 3. Form/Basis of Sub-Contract Agreement
>
> The agreement shall be in compliance with our main contract agreement with the client. You are to satisfy yourself as to the said agreement before submitting your quotation.

[28] Mr Gideon Tan also refers to the 'Letter Of Acceptance' dated 7 August 2007 written by the employer (MTM Millennium Holdings) to the defendants. In sub-paragraph (1) of the first paragraph of the letter it is stated:

> (1) You will be required to execute in due course a formal Contract Agreement. However, until the formal Contract Agreement is executed your Tender together with this Letter of Acceptance shall constitute a binding contract between your good selves and MTM MILLENIUM HOLDINGS SDN BHD.

[29] Mr Gideon Tan refers to the fact that the appellant/plaintiff had admitted to receiving the proposed sub-contract agreement from the defendants but had failed to sign and to return the same to the defendants; and instead the plaintiff proceeded to complete the work. Thus (so the defendants argue) there was acceptance of the terms of the written sub-contract agreement by conduct on the part of the plaintiff.

[30] With respect, we are unable to accept such an argument.

[31] In our judgment, in the present case, as the plaintiff had neither signed nor responded to the draft sub-contract agreement sent to it by the defendants, there is, therefore, no exchange of letters or faxes or other means of communication between the parties that provides a record of a written arbitration agreement. The mere fact that the plaintiff did not respond but proceeded to complete the work has no bearing on the issue as to whether or

not the requirement of limb (b) of sub-s. (4) of s. 9 was satisfied. It is a pertinent fact to note that the proposed draft sub-contract was sent at a late stage to the plaintiff. It was sent only in mid-October 2007 when the plaintiff had already commenced work on 27 August 2007 and had already submitted its first progress claim on 26 September 2007. On the facts, it can never be acceptance of the written sub-contract by conduct by the plaintiff by the mere fact of the failure to respond on the plaintiff's part. But the crucial question is: were there exchanges of letters or faxes or other means of communications between the plaintiff and the defendants that can be said to provide a record of a written arbitration agreement? Clearly the answer is in the negative. The letters referred to by the Mr Gideon Tan are, in our view, irrelevant or insufficient evidence to prove on a balance of probabilities the exchanges of letters etc that provides a record of a written arbitration agreement. The 'Invitation To Quote' letter received by the plaintiff from the defendants on 1 August 2007 does not contain any arbitration clause. It merely refers to 'our main contract agreement with client'. But the main contract (if ever there was any) is never exhibited. In fact, when the 'Invitation To Quote' letter was sent to the plaintiff, the defendants were yet to receive the Letter Of Acceptance dated 7 August 2007 from the employer. The plaintiff is not a party to the 'Letter Of Acceptance' letter. Both the defendants' 'Invitation To Quote' letter and the employer's 'Letter Of Acceptance' letter mention about a 'main contract agreement' (or 'formal contract agreement'). But we note that the defendants' affidavits are silent as to whether this main contract agreement was ever executed between the defendants and the employer; whether this main contract agreement ever contain an arbitration clause similar to cl. 10.1 of the alleged sub-contract. In any event, it is significant to note that this main contract agreement, including the alleged arbitration clause in it, was never exhibited by the defendants.